In the Supreme Court of the United States.

OCTOBER TERM, 1905.

ROBERT SAWYER AND ARTHUR ADAMS, plaintiffs in error, v. THE UNITED STATES. } No. 553.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NORTH CAROLINA.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The American schooner *H. A. Berwind* sailed from Philadelphia for Cardenas, Cuba, July 6, 1905, with a master, mate, engineer (for the donkey engine), and a cook or steward, all white, with four seamen, all colored, shipped at Philadelphia, three of them West Indians. There was quarreling between the crew and the officers and cook on the way down about the food and water, but no serious cause appears for the crew's complaints and the officers seem to have been conciliatory rather than harsh. (Rec., pp. 28, 36, 57.)

After the cargo was discharged at Cardenas the vessel proceeded to Mobile, where she lay for twenty-six

days (p. 60). At Mobile it seems that all four members of the crew purchased revolvers (p. 17). The *Berwind* sailed for Philadelphia with a cargo of lumber on September 23, 1905, and after passing through stormy weather, which disabled her, she was proceeding off the coast of North Carolina through the night of October 9–10, 1905. Between 4.20 a. m. on October 10 and 9 o'clock in the evening of the same day the four seamen, Scott, Adams, Sawyer, and Coakley, shot the three officers and the cook and forced them overboard while living, or threw their bodies overboard after they were dead (pp. 18–20, 29–30, 49–51). After these murders Scott shot and killed Coakley (pp. 21, 31, 52).

Scott swears that Adams, Sawyer, and Coakley committed the crimes; that he did not participate; was merely an unwilling witness of all that occurred, and, because of his own fear of death, was unable to oppose or prevent them; that they bound him with ropes and chains, and he killed Coakley in self-defense. Adams and Sawyer, on the other hand, swear that Scott committed all the murders alone and coerced and terrified them into acquiescence until they were able to seize and bind him. The truth appears to be that they were all responsible and willing participants; that a conspiracy had been formed, and that Scott was the ringleader, the three survivors having quarreled afterwards, and endeavoring in this way to cast the blame on each other. (Rec. *ut supra* and pp. 56–72.)

Responding to the signal of a red lantern hanging in the upper rigging, the American schooner *Blanche H. King,* coming up the coast the same night, sailed up to the *Berwind,* hailed her, received a response from Adams and Sawyer that Scott had murdered all the officers, and took the three men off, Scott being bound and the body of Coakley lying on the cabin roof of the *Berwind* (pp. 11, 15). All three of the men were immediately put in irons and confined by the master of the schooner *Blanche H. King;* he put some of his crew on board the *Berwinde,* and the two vessels proceeded into Southport, N. C., where the three seamen were turned over to the authorities (pp. 12, 27, 87). After investigation before two United States commissioners they were held for murder on the high seas. Adams and Sawyer were indicted in one bill, which was tried first, and Scott was indicted in a separate bill, which was tried afterwards (p. 89). Scott testified for the Government after being notified of his constitutional privilege, and Adams and Sawyer testified in their own behalf under a similar caution, and also against Scott. Scott did not sue out a writ of error, but was reprieved by the President, to be available as a witness in case there should be a new trial.

After the conviction of Adams and Sawyer there were motions for a new trial and in arrest of judgment, which were overruled. A bill of exceptions was filed December 4, 1905 (pp. 82–85), and then

an extension of time was granted and an amended bill of exceptions was filed December 21 (pp. 86–101).

ASSIGNMENTS OF ERROR.

These were (Rec., pp. 104–105): Standing jurors aside (second assignment); challenge to the array and manner of summoning certain jurors (third assignment); remarks of prosecuting attorney to jury (fourth assignment); charge of court respecting the killing of Coakley (fifth assignment); objection that the entire charge was not reduced to writing (sixth assignment;) cross-examination of defendant Adams (seventh assignment).

ARGUMENT.

I.

STANDING JURORS ASIDE.

This objection is that "several jurors" were called and told by the United States attorney to stand at the foot of the panel without any challenge on the part of the Government and without any opportunity to defendants to accept, challenge for favor or cause, or peremptorily challenge (Rec., p. 90). But it also appeared that neither the Government nor the defense had exhausted all their peremptory challenges when the jury was empanelled (id.). How many jurors were stood aside does not appear. It is quite consistent with the record that even charging the jurors stood aside against the Government, its five peremptory challenges (R. S., 819) had not been exhausted; and it is certain the defendants

did not require all their peremptory challenges. These facts take all real force from the objection.

But examining the law, this right of the prosecution to stand aside temporarily is founded in a Crown privilege, and has always been widely recognized. The practice must be exercised under the supervision of the court, who will restrain it if applied to an unreasonable number of jurors. It began with the 33 Edw. I, which took away the unlimited peremptory challenges by the Crown, and required those suing for the King to challenge for cause. Yet the cause need not be shown till the whole panel was gone through. If the panel is exhausted before the jury is complete, then jurors set aside must be called and must serve unless challenged by either side (*United States* v. *Marchant*, 12 Wheat., 480; *United States* v. *Wilson*, 1 Baldw., 82; *United States* v. *Douglass*, 2 Blatchf., 207; *State* v. *Benton*, 19 N. C., 196.)

It is to be observed that in *United States* v. *Douglass*, as was pointed out by Judge Betts in his opinion (which was called a concurring opinion, although dissenting on this point), the rule was laid down, although the act of 1840 (5 Stat., 394) intended to conform regulations as to jurors to the respective State laws, and the New York law did not allow the standing aside of jurors.

In *United States* v. *Shackleford* (18 How., 588) the court recognized this right, but with some doubt, and expressed the view that the Federal practice in this respect should conform to State law.

The right of peremptory challenge was first given the Government by the act of 1865 (March 3; 13 Stat., 500), and this was amended by the act of 1872 (June 8; 17 Stat., 282; Rev. Stat., 819), by which, in the case of a capital offense the defendant is entitled to twenty and the United States to five peremptory challenges.

United States v. *Butler* (1 Hughes, 457) is the only case since the right of peremptory challenge was thus given to the Government in which the question of standing jurors aside has been considered. There the court held that "as the right of challenging jurors peremptorily has been given the prosecution, it should stand on the same footing as the defense, and either exercise the right of challenge at once or not at all."

So much for the Federal authorities, separately and distinctively considered; in which, however, the last view expressed by this court was (the *Shackleford case, ante*) that the State rule should be followed.

In the States of North Carolina, South Carolina, and Pennsylvania, as is conceded by the defense here, the rule is established. That is to say, the right of the prosecution temporarily to stand jurors aside is settled, although each of those States gives the prosecution the right of peremptory challenge, and although in two of these States (South Carolina and Pennsylvania) the prosecution and the defense have an equal number of peremptory challenges. (N. C.

Revisal, 1905, sec. 3264; S. C. Code, 1902, p. 242, sec. 5; Brightly's Dig. Pa. Laws, 1893–1902, p. 361, sec 3.)

In *Haines* v. *Com.* (100 Pa., 317), it was contended that as the Commonwealth was now entitled to peremptory challenges, the practice of standing jurors aside should be discontinued. The court, referring to the origin of the practice in the statute of 33 Edw. I, said that it had been so long continued and uniformly sanctioned that it had acquired the force of positive law; that there was nothing to indicate that the legislature intended any modification of the practice, "and therefore we have no right to interfere with it" (following *Warren* v. *Com.*, 1 Wright, 45); that the right claimed by the Commonwealth should always be exercised under the supervision of the court, and when that is done it is difficult to understand how the interests of the defendant can be unduly prejudiced.

See also *Smith* v. *Com.* (100 Pa., 324), and *Rudy* v. *Com.* (128 Pa., 500).

In *Com.* v. *O'Brien* (140 Pa., 555) the court was very brief on the subject, simply saying that the right of the Commonwealth to stand aside jurors is no longer an open question, citing the Haines, Smith, and Rudy cases, and stating that the rule was not changed by the law allowing peremptory challenges to the Commonwealth.

The courts of South Carolina take precisely the same view. Opposing counsel cite some of the cases

in order to disapprove of them (brief, p. 14); and I call the court's attention especially to *State* v. *McNinch* (12 S. C., 89), and *State* v. *Stephens* (13 S. C., 285). The principle has been firmly established in North Carolina from an early day.

State v. *Craton*, 6 Ired., 164.
State v. *Arthur*, 13 N. C., 217.
State v. *Benton*, 19 id., 196.
State v. *Bone*, 52 id., 121.
State v. *Jones*, 88 id., 1671.
State v. *Gooch*, 94 id., 982.
State v. *Hensley*, id., 1021.
State v. *Sloan*, 97 id., 499.

All of these cases were capital cases. The Hensley case is a well-considered and leading authority. The court shows the logic of the rule residing in the absence of prejudice to the defendant as follows (94 N. C., at p. 1029):

> These, and other like cases, rest upon the ground that the right of challenge is intended to secure a fair and impartial trial, and to that end to exclude from the jury persons objectionable for one or another just cause. It is no part of the purpose of the right of challenge to afford the prisoner opportunity to select a particular juror or jurors, most likely to acquit or to give him undue advantage. * * * His right is to have a jury fair, impartial, and free from just exception, and when the jury is selected without objection, the prisoner having the right to object further, it must be presumed conclusively that such a jury has been obtained.

The defendants concede the North Carolina rule, but object that under the decision in *United States* v. *Shackleford* (*ante*) the State practice must be adopted by rule of court in accordance with the act of 1840 (now sec. 800, R. S.); that there is no rule of the trial court adopting the North Carolina practice, and that in any event the power to adopt the law of the State would not extend to the matter of the challenges of jurors in the case of a capital crime. But the decision in the Shackleford case, rendered before the United States was entitled by statute to any right of peremptory challenge, related to the large number of challenges allowed to persons indicted for treason or other capital crimes by the Crimes Act of 1790 (sec. 30; 1 Stat., 119), and merely held that State practice adopted under rule of court could not cut down the number of these challenges given the defense.

Further, the latest authority on the point sustains our contention as to following the State rule. *Pointer* v. *United States* (151 U. S., 396) was a case of murder coming from the Western District of Arkansas, and the complaint there was the opposite of the present one, viz, that the Circuit Court should have followed the State practice but did not. The court, by Mr. Justice Harlan, held that while the court below was at liberty to pursue the method required by the law of Arkansas, it was not bound to do so; saying, among other things, on this point (p. 407):

> Congress has not made the laws and usages relating to the designation and empaneling

> of jurors in the respective State courts applicable to the courts of the United States, except as the latter shall by general standing rule *or by special order in a particular case* adopt the State practice in that regard.

Whether or not there was here a "general standing rule" in the Circuit Court adopting the State practice, it is plain there was a "special order" or ruling in this particular case. At page 90 of the record it is stated that each action of the district attorney in standing jurors to the foot of the panel was duly objected to by defendants, "but the court overruled the objections, saying the State practice would be followed, and there was no United States statute on the subject."

The Pointer case squarely held that a prisoner on trial in a Federal court for murder is not entitled to have the Government exhaust its peremptory challenges first. The court in that case also found that defendant had not been prejudiced by the method pursued, that the essential right of challenge to which he was entitled was fully recognized, that the right of peremptory challenge is not of itself a right to select but a right to reject jurors (citing *United States* v. *Marchant*, 12 Wheat., 480, and *Hayes* v. *Missouri*, 120 U. S., 68), and there was no reason to suppose that he was not tried by an impartial jury. The opinion also cites *Lewis* v. *United States* (146 U. S., 370, 379), as recognizing the authority of the Circuit Courts of the United States to deal with the subject of impaneling juries in criminal cases by rules

of their own. In that case a similar objection had been made, and the court said:

> We do not deem it our duty to prescribe in this opinion rules to regulate the discretion of the Circuit Courts in the impaneling of jurors in criminal cases. Perhaps the preferable course would be for the Circuit Courts to adopt the methods prescribed by the statutes of the States, because such methods are familiar to the bar and the people of the States. If, however, the Circuit Courts choose to deal with such matters by rules of their own, we think it essential that such rules should be adopted to secure all the rights of the accused.

At all events, it does not appear that prisoners were in any way prejudiced, either in the matter of the challenge to the array (see *post*) or the standing of jurors to the foot of the panel. They had a trial by a competent and impartial jury, and as they obtained such a jury from those who remained on the panel this was all they could demand. (*Northern Pacific R. R. Co.* v. *Herbert*, 116 U. S., 642, citing *United States* v. *Cornell*, 2 Mason, 104, and State cases; *Hayes* v. *Missouri*, 120 U. S., 68, 71; *Brown* v. *New Jersey*, 175 U. S., 172, 175.)

The conclusion is that there is no doubt of the State practice; it is the proper practice for the Federal courts and was applied by the court in this case; the rule is reasonable and is subject to the discretion of the court to prevent the right under the rule from being exercised unreasonably; it was not exercised unreasonably in this case; the defendants obtained a fair

and impartial jury, which is all they were entitled to; neither the Government nor the defendants exhausted their challenges. It is to be remembered that the defense has twenty challenges and the Government five.

It is very evident that the defendants were not injured or prejudiced in fact by standing jurors aside, and it is idle to depict extreme cases of possible injustice. The undoubted tendency of the courts in reference to this matter is to ignore all technical objections as to impaneling the jury unless actual injury results.

II.

CHALLENGE TO THE ARRAY AND MANNER OF SUMMONING CERTAIN JURORS.

These objections are not pressed and indeed are not tenable. They came too late. Challenge to the array must be made before the jury is empanelled. The record here distinctly says that "after the jury was empanelled the defendants challenged the array" (p. 90). (*United States* v. *Butler*, 1 Hughes, 457, 463; *Gropp* v. *People*, 67 Ill., 154; *Mueller* v. *Rebhan*, 94 id., 147; *Goodman* v. *Goetz*, 36 N. Y., 731; *Jackson* v. *State*, 4 Tex. App., 292; *Mayor, &c.*, v. *Mason*, 4 E. D. Smith (N. Y.), 142; *State* v. *Douglass*, 63 N. C., 500.)

"If a juror attend the court for which he is regularly drawn, it is sufficient." (*United States* v. *Cornell*, 2 Mason, 91—an indictment for murder.)

Irregularities in bringing jurors into court are waived by a plea of not guilty. (*Com.* v. *Seybert*, 4 Pa. Co. Ct. Rep., 152.)

Where jurors are summoned by telephone (*Goodland* v. *Le Clair*, 78 Wis., 176; *People* v. *Burgess*, 153 N. Y., 561); where no positive injury resulted from obtaining a panel irregularly (*Wilhelm* v. *People*, 72 Ill., 468; *People* v. *Madison Co.*, 125 id., 334; *State* v. *McElmurray*, 3 Strobh. L. (S. C.), 337); where the defendants have not exhausted their peremptory challenges (*Franklin* v. *State*, 34 Tex. Crim. Rep., 625; *Williams* v. *State*, 29 Tex. App., 89; *State* v. *Clyburn*, 16 S. C., 375; *State* v. *Price*, 10 Rich. (S. C.), 356; *State* v. *McQuaige*, 5 S. C., 429) it has been held that challenge to the array is not tenable.

III.

REMARKS OF PROSECUTING ATTORNEY TO JURY.

This objection (p. 96) is that in the course of his remarks to the jury, the district attorney, referring to the defendant Sawyer, said: "A man under such circumstances who would drink coffee ought to be hung on general principles." It appeared that, in the midst of the tragedy, seemingly after the captain and engineer had been shot and forced overboard and before the mate and cook had been killed, the accused made coffee and drank it and ate some bread (pp. 46, 50, 64, *et seq.*). While they were making the coffee, Adams and Sawyer watched Scott and the mate fighting and the mate sang out pleading "Sawyer, for God's sake help me!" (p. 50, 66, 67). But they did not go to his assistance nor interfere at all with Scott's bloody work, on their own story of the crime. In

commenting on this testimony the district attorney in the heat of argument said that men who could cook and eat and drink coffee under such circumstances ought to be hung on general principles. Doubtless this was said in the course of pointing out that the defendants' plain duty was to go to the rescue of their officers who were being slaughtered in their presence, even at the hazard of their lives, if they expected any jury to believe their improbable statements. The remark was natural enough and at the most was extravagant. No jury would be influenced to the prejudice of a defendant by any such heated and general statement. Considered in itself, it had no substantial relation to the issue or even to the credibility of the witnesses, but merely expressed the prosecutor's justifiable scorn and indignation at the defendants' callous inhumanity.

The control of argument is necessarily committed largely to the discretion of the trial court, and appellate courts will interfere only in cases where the trial court has refused to exercise its powers, or where it is manifest that its discretion has been abused by permitting prejudicial matters to be rehearsed to the jury in argument. (1 Thompson on Trials, sec. 964.)

In *Graves* v. *United States* (150 U. S., 118), where the trial court was held to be in error in permitting the district attorney to comment on the absence of defendant's wife from the trial, Mr. Justice Brown said:

> While we do not wish to be understood as holding that comments by the district attorney upon the facts not in evidence, or statements made having no connection with the case, or exaggerated expressions, such as counsel in the heat of trial are prone to indulge in, will necessarily vitiate a verdict, if not objected to, yet when the attention of the court is called to them specially, and objection is made, it is its duty to interfere and put a stop to them if they are likely to be prejudicial to the accused [citing *Wilson* v. *United States*, 149 U. S., 60; *Hall* v. *United States*, 150 U. S., 76].

In the Hall case as, apparently, in the Graves case, the trial judge declined to interpose, in spite of defendant's protest, against the district attorney's comments. The facts are different in the present case; upon defendants' counsel objecting, the court admonished the district attorney "to confine himself to a proper argument, and the district attorney expressed his regret if he had made an improper argument." (Rec., p. 83.)

The court gave "an exception which the court considers frivolous, but has already admonished counsel to confine himself to a proper argument, but the court will not put down in writing the words or comments as used to counsel for the defendants," all of which appears at pages 83 and 84 of the record. (Original bill of exceptions; amended bill, p. 96.) Now, the objection *was* frivolous; the remark could not be prejudicial to the accused, and the district attorney was duly admonished.

The books are full of illustrations of the indulgence extended by courts to extravagant declamation and exaggeration by counsel in argument. The rule is clear, viz, that to justify reversal the remarks must be plainly improper and of a material character "as to a substantive, outside fact, stated as a fact" (68 Ala., *ut infra*), likely to affect the defendant's rights injuriously. It is only necessary to cite a few of the authorities:

Cross v. *State*, 68 Ala., 476, 484.
Pierson v. *State*, 18 Tex. App., 524, 564.
House v. *State*, 19 id., 227.
Shular v. *State*, 105 Ind., 289, 302;
1 Thompson on Trials, sec. 964 *et seq.*
State v. *Griffin*, 87 Mo., 608, 615 (a defendant indicted for murder was called a "murderer").
Polin v. *State*, 14 Nebr., 540, 548 (the plea of insanity was referred to as generally a "sham" and "device").
Combs v. *State*, 75 Ind., 215.

In *State* v. *Stark* (72 Mo., 37) the prosecuting attorney said that "the defendant had gone to the Indian Territory, where all rascals go." The court on appeal held: "Defendant in his own testimony states that he went there. The additional words 'where all rascals go,' whether true or false, could certainly have had no effect upon the jury."

See also *State* v. *Hamilton*, 55 Mo., 520, 522; *Com.* v. *Nicely*, 130 Pa., 261, 269; *Thompson* v. *Barkley*, 27 Pa., 263; and *State* v. *Horner* (139 N. C., 606, 608), where the subject is again discussed, upon the use of the word "outlaw" by counsel for the State.

Opposing counsel cite (brief, p. 28) a decision of this court and two other Federal authorities, with the exclamation, "How different the action of the court in this case!" From an examination of those authorities, it is plain that the action of the court was not so very different, and that the proper comment is rather, "How different was the language of the prosecuting attorney" in those cases, either in itself (*Dunlop* v. *United States*, 165 U. S., at p. 498) or because of the peculiarly strong rule against commenting on the absence of the defendant's witnesses (*Wright* v. *United States*, 108 Fed. Rep., at p. 812). In the third case (*United States* v. *Alexander*, 119 Fed. Rep., 1015) the language is not shown, and it simply appears that the court stated to counsel in the presence of the jury in the most emphatic way that the language was improper and ought not to have been used, and as no further action by the court was requested and no exception taken, the language, whatever it was, was not ground for a new trial. Further, the court adds: "I do not believe that the defendant was prejudiced in the slightest by the remark," and that might be applied to the present case.

IV.

CHARGE OF COURT RESPECTING THE KILLING OF COAKLEY; NOT REDUCING THE ENTIRE CHARGE TO WRITING.

These assignments are not pressed, the first not at all, the second not seriously. The charge (pp. 97–100) relieved the defendants of the killing of Coakley and plainly the error (as it turned out to be)

of including the killing of Coakley in this bill was thus entirely cured.

The charge was put in writing at the request of defendant's counsel (pp. 96 *et seq.*, p. 100). "The court then defined a conspiracy, giving the general definition as laid down by the Supreme Court," and the exception was that, although requested by counsel for defendants at the close of the testimony to put the charge in writing, the court "proceeded to charge on the law of conspiracy outside of and in addition to the written charge" (p. 100). This verbal charge is then quoted. No exception was taken to it as to substance, and, indeed, none could be. The objection simply was that it was not put in writing.

An oral statement not prejudicial to defendant does not violate that section of the North Carolina Code which requires a judge when requested in apt time to put his instructions to the jury in writing. (*State* v. *Dewey*, 139 N. C., 560, 562, and cas. cit.) "It is not the policy or purpose of the statute, nor does the language used bear such rigorous construction as to forbid any and all oral expressions from the presiding judge." (*Currie* v. *Clark*, 90 N. C., 355, 361; *State* v. *Crowell*, 116, id., 1052, 1057–8.)

Now, applying the principles of these decisions, the indictment (pp. 5, 89) did not charge conspiracy; it charged murder alone, and the defendants were not found guilty of conspiracy, but of murder. No exception could be taken to the written charge on the actual and substantive offense. It seems pretty

clear from the testimony as to a concerted purpose between these defendants and the other seamen, and from the reference by the court (p. 100) to the "prayer" of the Government, and from the Government's request for instructions as to the testimony of an accomplice (p. 99), that the court merely stated (and unexceptionably) the nature and legal effect of a conspiracy, because that was a pertinent feature of the entire case, and was preliminary in the sequence of events to the actual crime perpetrated and charged. The court was not then, in this oral deliverance, instructing the jury on the law of the case. The language was brief and informal; it was no doubt legitimately called for. If, however, it was perhaps unnecessarily interjected or added, it may be regarded as surplusage and ignored. It is clearly within the North Carolina rule and is not reversible error.

As to the North Carolina cases cited by the defendants (brief, p. 29)—in *Dupree* v. *Ins. Co.*, the court says that the law "only requires to be written and read to the jury * * * so much of the charge as embodies a proposition or principle of law which, if erroneous, admits of correction." In *Jenkins* v. *R. R. Co.* the reason is given why the defendant is entitled to insist on the entire charge as to the law being put in writing, viz, in order that the jury may take it with them on their retirement or to avoid disagreement between counsel as to its meaning in making up the case on appeal. As to *State*

v. *Tyson*, there is absolutely nothing on this subject. There the only exception was to the language of the prosecuting attorney, and the court held that being taken after verdict, it was too late.

V.

CROSS-EXAMINATION OF DEFENDANT ADAMS.

The examination in chief appears in the bill of exceptions (pp. 91–95) and in the body of the record (direct examination, pp. 28–32; cross, pp. 32–47; redirect, 47–48). On the cross-examination of Adams, after questioning the witness as to his experience as a seaman, the district attorney asked the question: "I will ask if within the latter part of the fifteen months you were on the schooner *Benefit* you did not have trouble and try to create insubordination aboard the *Benefit?*" (pp. 32–33). The defendant's objection to this question was that it was not within the scope of the examination in chief, nor the proper limits of cross-examination. The subsequent questions on the same line (p. 33) merely developed the fact that Adams had complained of the food on the *Benefit*. He denied insubordinate and mutinous conduct there. He answered all these questions in the negative.

Scott testified that Adams and Sawyer were quarrelsome about food and water on the way to Cuba; also while they were lying at Cardenas and on the way to Mobile (p. 16); that there was quarreling again after leaving Mobile (p. 17); that Sawyer

and Adams were quarreling about food the whole trip (p. 22). Adams in his direct examination attributed the quarreling to Scott and Sawyer (p. 28). He denied that there were any threats of mutiny made by the crew between Philadelphia and Cardenas, or Cardenas and Mobile (p. 32). He was being cross-examined as to circumstances touched upon in his direct examination constituting a cause of the crime finally perpetrated, and connecting him with it, and also to impeach his testimony. He had taken the stand in his own behalf, and had given in his examination a brief summary of his life, his birth at St. Vincents Island, his occupation as a sailor, etc. The cross-examination was clearly within the scope of the direct examination. When he was called on to particularize his life as a sailor, and the ships he had sailed on, and his conduct thereon, certainly if this testimony was impeaching in its tendency, it was competent. In any event, "its course and extent was subject to the control of the court in the exercise of a sound discretion, and is not reviewable on a writ of error." (Authorities, *post*.)

It is laid down that a defendant in his witness character is on the same footing as any other witness. This was recognized in the late case of *Fitzpatrick* v. *United States* (178 U. S., 304, 315). In general, cross-examination of a defendant witness in a criminal case is restricted to the matter of the examination in chief and to matter affecting his credibility. Some special indulgence is shown to a defendant

witness when as to a particular question the privilege against self-incrimination is invoked, but that feature does not enter here. On the other hand, when, as here, the privilege does *not* complicate the case, a witness who is a party subjects himself to especial latitude in cross-examination, and there are authorities to that effect. That is to say, it is also a general principle of evidence that when a party is a witness he may be cross-examined on matters not within the direct examination, the course and extent of such cross-examination being committed to the control of the court in the exercise of a sound discretion, which is not reviewable on writ of error. This doctrine has been distinctly stated by the court in civil suits (*Storm* v. *United States*, 94 U. S., 76; it does not clearly appear whether or not the witness was a party). There the court said (p. 85):

> It is plainly within the discretion of the presiding judge to determine whether, in view of the evidence previously introduced and of the nature of the testimony given by the witness in his examination in chief, it is fit and proper that questions of the kind should be overruled, and to what extent such a cross-examination shall be allowed.

In *Rea* v. *Missouri* (17 Wall., 532, 542), the virtual plaintiff was the witness, and the court (by Bradley, J.) used language, which I have closely followed above in stating the principle, and which was quoted and approved in *Davis* v. *Coblens* (174 U. S., 719, 727). The same doctrine was approved

in *Blitz* v. *United States* (153 U. S., 308) (an indictment for illegal voting); the question asked witness was excluded, and that action of the trial court was sustained under this principle, the court saying (p. 312):

> If the object was to test the accuracy or credibility of the witness, it is quite sufficient to say that the extent to which a cross-examination may be allowed for such a purpose * * * is largely subject to the sound discretion of the trial court, and the exercise of that discretion is not reviewable upon writ of error.

Manifestly, if a different question were admitted, the same principle of control by the discretion of the court would be applicable.

See also *Allen* v. *United States* (115 Fed. Rep., 3, 11), where the court said, referring to the cross-examination of the defendant, that if it had been confined to the purpose of bringing out facts that had any specific relation to the offense alleged, or of impeaching or discrediting witness, "it would have been the duty of the court to have allowed great latitude in the cross-examination of this witness, and the questions allowed would have been largely within the reasonable discretion of the court."

Why should not this rule of liberality in cross-examining a party witness be equally applicable in criminal and civil cases, if there is no reason founded in a claim of privilege for guarding the defendant character against the witness character? I submit

that the requirements of a person's position as a witness should be maintained and should not be sacrificed to a possible or mere incidental infringement on his position as defendant.

On this point it is interesting to note that in Indiana the Civil Code provided (R. S. 1838, p. 275; Civil Code, sec. 242) that general moral character was admissible on cross-examination in civil cases, which was construed to extend to specific moral traits. (*Walker* v. *State*, 6 Blackf., 3; *Indianapolis, &c., Ry. Co.* v. *Anthony*, 43 Ind., 183, 193.) Originally this rule was treated as not applicable in criminal cases (*Fletcher* v. *State*, 49 Ind., 131), but in 1881 it was extended to criminal cases. (R. S. 1881, sec. 1803.)

These ideas are all in accordance with the general recent current of free cross-examination and restriction of a defendant's protection and privileges to his actual needs at the present day. The two theories of cross-examination to discredit are formulated, on the one hand, by Scroggs, L. C. J. (1680), who said in Lord Castlemaine's trial (7 How. St. Tr., 1067, 1084): "You may give in the evidence of every record of the conviction of any sort of crimes he has been guilty of;" and, on the other hand, by Holt, L. C. J., in *R.* v. *Warden of the Fleet* (12 Mod., 337, 341), as follows: "In respect to a person who had been burnt in the hand [for manslaughter and afterwards pardoned] it were no objection to his credit;" but otherwise as to stealing, even with pardon. Now, the more humane

and logical rule of Lord Chief Justice Holt is undoubtedly established, and the courts of our day insist on decency in cross-examination, but it is nevertheless true that "the more modern practice seems to have maintained this theoretically unlimited license of cross-examination even after the middle of the 1800's, when the privilege against disgracing answers was no longer recognized." (2 Wigmore on Evidence, sec. 986, p. 1123, and *passim*, with notes and authorities.)

Coming to our own rules, it is certainly true that throughout the many jurisdictions in the United States, and amid conflicting decisions and contrary practice, the weight of authority commits the control and scope of cross-examination to the discretion of the court, and permits any witness to be impeached on cross-examination, always by questions going to his veracity, generally by questions directed at his reputation in allied respects, honesty, probity, integrity, often by general character, and, less frequently, but still in numerous cases, by specific instances of other misconduct than the different varieties of the *crimen falsi*.

The impeachment of a defendant as witness, the scope of his cross-examination, and the admissibility of character evidence to impeach, are discussed in Wigmore (vol. 2, secs. 889–891, pp. 1013–1016; sec. 922, 923, pp. 1058–1061); the note to section 924 collects the State authorities on bad character in general and specific traits; sections 925 and 926 distinguish between bad character as witness and party,

and consider the use of prior convictions and other instances of misconduct, pages 1062–1066; (see also sec. 987 and note, for "scope of cross-examination;" sec. 983, pp. 1111, 1126, vol. 3, sec. 2277, p. 3159.)

A few courts dealing with *specific misconduct on cross-examination* permit the use only of misconduct directly bearing on credibility, but *most courts* make no attempt to do this. (Wigmore, *ut sup.*, secs. 925, 926.) Sometimes decisions of the same State are at variance with each other on this point of specific misconduct on cross-examination (notes to sections last cited).

But, however the rule may be elsewhere, the law of North Carolina admits great latitude on cross-examination; bad character may be shown, and, it seems, specific instances of misconduct as well.

In *Fitzpatrick* v. *United States* (*ante*), a case of murder coming from Alaska, the court cited decisions of Oregon, where the restrictions on cross-examination of a defendant witness appear to be somewhat rigorous, doubtless for the reason that the laws of Oregon were applicable to offenses committed in Alaska. It is of course evident that in the present case the state of the law in North Carolina is of the utmost importance, if not controlling. It is held that ever since 1804 it has been the established rule of practice to discredit a witness by making proof of his general bad moral character, and the question need not be restricted to his reputation merely for veracity. "As the prisoner assumed the character of a witness, he

must needs come under the same law," and this rule continues to be the law of evidence as administered in the courts of North Carolina. (*State* v. *Efler*, 85 N. C., 585, 588, citing *State* v. *Boswell*, 2 Dev., 209; *State* v. *O'Neale*, 4 Ired., 88; *State* v. *Dove*, 10 Ired., 469; *State* v. *Parks*, 3 Ired., 296; see also *State* v. *Stallings*, 2 Hayw., 300.)

In *State* v. *Thomas* (98 N. C., 599) the court thus describes the line of inquiry: "The testimony sought to be elicited in this case was disparaging only and would not expose the witness to the perils of a criminal prosecution if true, for that is assumed to have already taken place." The indictment was for murder, and the prisoner was examined as a witness on his own behalf, and the first objection was the compelling him to tell with what crime he was *charged* before removing from Alabama. Manifestly this was specific misconduct not necessarily going to veracity and was matter of accusation rather than conviction. The main point ruled was that if a person charged with crime voluntarily testifies in his own behalf, he waives his privilege of refusing to answer on the ground of self-incrimination, and various State cases are reviewed in which such questions as the following were asked and sustained: "Have you ever been arrested before for theft?" Citing the Efler case, the court says:

> When a person on trial * * * shall avail himself of the right * * * to become a witness on his own behalf, he occupies

> as such the same position that any other witness would, and exposes himself to the same discrediting and impeaching evidence.

The question was sustained and the judgment affirmed.

The rule in the western jurisdictions is generally more strict; but I select a typical leading case, as showing the reasonable limits of the protection claimed where less latitude is allowed than in North Carolina. In *State* v. *Pancoast* (Supreme Court of North Dakota, 35 L. R. A., pp. 518, 527, 533) the particular questions on cross-examination are not shown, and a claim of privilege was made, but it was held that this claim was not made with sufficient definiteness, the questions were sustained, and the judgment of conviction affirmed. The court states the object of cross-examination, viz, to weaken the force of the testimony given in chief, and holds that to this end it is proper to show the relations of the witness to the case and the parties and the facts, his interest, his motives, his means of knowledge, etc., "and subject to the constitutional privilege of a witness to refuse to answer questions the answers to which may tend to criminate him, it is proper to show collateral facts that might tend to criminate, disgrace, or degrade the witness, if such other facts tend to weaken his credibility," citing authorities.

The doctrine is laid down that a defendant witness subjects himself to the same rules of cross-examination as other witnesses, "with the exception that his

privileges are to some extent curtailed in that he is not only required to answer any relevant and proper question on cross-examination that may tend to convict him of the offense for which he is being tried, but he must also answer any such relevant and proper question that may tend to convict him of any collateral offense when such answer also tends to convict him of the offense for which he is being tried, or bears upon any of the issues involved in such case," citing many authorities.

It is submitted that at every point the present case is within the rule of *State* v. *Pancoast*.

But whatever the view might be as to the propriety of this cross-examination, there are two final reasons why reversible error can not be predicated on this objection. The answers to these particular questions and the other like questions were all in the negative. Now, while as a speculative question it has been suggested that it is inaccurate to say that the witness's answer, if in the negative, "must be taken for true," because all that could be said is that the prosecutor only accepts the chances of the jury believing a negative answer; nevertheless the rule is well established as a practical matter that the State is bound by the answer. "Nothing is better settled than that where a witness is asked as to collateral crimes for this purpose [affecting credibility] his answers are absolutely conclusive on the party asking." (*State* v. *Pancoast*, *ut sup.*, p. 533, citing 3 Rice on Ev., sec. 222; see also *People* v. *Jackson*, 3 Park Cr., 391; *Oxier* v.

United States, 38 S. W., 331; *Newcomb* v. *Griswold*, 24 N. Y., 298; 1 Starkie on Ev., 190.) The witness-defendant is not prejudiced and no reversible error has been committed.

The decisions cited by opposing counsel to the contrary (*Bates* v. *State*, *Gale* v. *People*, *People* v. *Wells;* brief, p. 23) merely show first, that irrelevant questions calculated to prejudice a defendant may be asked if they clearly go to impeach his general moral character and his credibility as a witness; and this is in our favor; second, that the courts will restrain prejudicial questions, assuming the existence of damaging facts and put with such persistency and show of proof as to impress the jury, even though the prisoner denies them and there is no other evidence; that is, "an insinuating style of questioning" will not be permitted. (*State* v. *Pancoast ut sup.*, 35 L. R. A., p. 532.)

Again, while counsel objected to this question, they did not follow up that objection by requesting the court to charge the jury, if the testimony were admitted, that it could only be considered by them on the question of veracity. The testimony being admissible on the point of credibility at all events, for what it might be worth, the defendants must be held to have waived further objection by not taking this course; and the court was not bound to give instructions upon that particular question since they were not requested. (*Com.* v. *Kneeland*, 20 Pick., 206, 222; *Hodge* v. *State*, 85 Ind., 561; *Powers* v. *State*, 87 id., 144, 153; *Ed-*

wards v. *State*, 47 Miss., 581, 589; 2 Thompson on Trials, secs. 2339, 2341, 2343.)

The cases cited by the defendants on this point merely holds that where *corroborative* evidence is introduced, it is the duty of the court, although not requested, to instruct the jury that it was to be considered as corroborative and not as substantive testimony. (*State* v. *Parker*, 134 N. C., 209, 213.)

I respectfully submit that there is no error in this record and that the judgment below should be affirmed.

HENRY M. HOYT,
Solicitor-General.

C